Supreme Court, U.S.
FILED
SEP 6 1995
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No. 95-221

In The

Supreme Court of the United States

October Term, 1995

ALLAN AND ALLAN ARTS, LTD.,

Petitioner,

vs.

GLORIA ROSENBLUM,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals, State of New York

RESPONDENT'S BRIEF IN OPPOSITION

GLORIA M. ROSENBLUM
Respondent, Pro Se
192 West Main Street
East Islip, New York 11730
(516) 581-2900

7372
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

26pp

QUESTIONS PRESENTED

1. Should Petitioner's writ of certiorari be granted when the only issue is whether it was appropriate for a state court to grant absolute privilege, instead of a qualified privilege, to relevant statements made by an adjoining landowner opposing Petitioner's application for a zoning variance before a Village Zoning Board of Appeals?

2. Is the question of whether a state court incorrectly applied an absolute privilege instead of a qualified privilege to relevant statements made during a quasi-judicial hearing a federal issue?

3. Do the First and Fourteenth Amendments provide protection to a corporation spoken about or to the person who does the speaking.

4. Is a state abridging a corporation's First and Fourteenth Amendment rights when it grants immunity to a person who exercised her right of free speech by making relevant statements opposing the corporation's application to a municipal board during a public hearing in which public participation is requested?

5. Should damages be awarded under the Court's Rule 42.2, when the petition is frivolous and it represents the continuation of what the state's appellate court recognized as a SLAPP — Strategic Lawsuit Against Public Participation — suit, which is designed to punish a person for opposing an application to a municipal board and intended to discourage and intimidate others from doing so?

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I

OPINIONS BELOW

All the courts below have denied Petitioner's request for relief and Petitioner has exercised its rights to appeal to all the available state courts.

The history of this dispute dates to 1990, when Petitioner sued Respondent, alleging that statements made by Respondent at a municipal zoning hearing were defamatory. Petitioner, a New York corporation, commenced the action in the New York State Supreme Court (hereinafter "trial court"). (A29). The trial court granted Respondent's motion to dismiss Petitioner's complaint for failure to state a cause of action, on the ground that relevant statements made by Respondent, an adjoining landowner, at a judicial hearing conducted by a Village Zoning Board of Appeals (hereinafter "Zoning Board of Appeals") against Petitioner's application for a zoning variance are entitled to absolute privilege. (A29-30). Petitioner claimed, in the courts below and now to this Court, that a qualified privilege not an absolute privilege should have been applied. (Petitioner's Brief, pp. 17-34).

The New York State Supreme Court, Appellate Division, Second Department (hereinafter "Appellate Division"), denied Petitioner's appeal in a unanimous decision, on the same ground as the trial court. (A6).

In its opinion, the Appellate Division pointed out that Petitioner's action was a SLAPP ("Strategic Lawsuit Against Public Participation") suit, that is, a lawsuit designed to punish a person or entity for opposing an application to a municipal board and intended to discourage and/or intimidate others from doing so. (A25).

Petitioner's application to the Appellate Division for

reargument and for leave to appeal to the New York State Court of Appeals was also denied. (A2-3). Thereafter, Petitioner applied to the Court of Appeals for leave to appeal to it, which was denied. (A7). This exhausted all of Petitioner's appeals in state courts.

STATEMENT OF JURISDICTION

Petitioner sets forth absolutely no legal authority to support jurisdiction.

Respondent respectfully submits that this Court does not have jurisdiction to review the order in question by writ of certiorari, because the only question presented by the Petitioner is strictly a state issue. (Petitioner's Brief, pp. i & 20). It does not concern conflicting decisions of the United States courts of appeal or another state's court of last resort, nor does it bring into question the validity of a treaty or statute of the United States or the validity of a statute of any state on the ground of it being repugnant to the Constitution, treaty or laws of the United States.

Although Petitioner claims a right under the First and Fourteenth Amendment of the Constitution of the United States, that right belongs to Respondent, who made the utterances, and not the Petitioner. The Petitioner did not raise a constitutional issue in the courts below. (Petitioner's Brief, p. 9).

Nor does Petitioner's issue of whether the New York courts should have applied a qualified, instead of absolute, privilege to statements have any federal precedential value. In addition, a state court is the final arbiter of its own laws and is free to define immunity defenses, such as absolute privilege, that broaden, not restrict, free speech.

STATEMENT OF THE CASE

A. Facts

Petitioner operates a theater business on property in a residentially zoned area, located immediately adjacent to Respondent's home, by virtue of a variance granted in 1962 by the Zoning Board of Appeals of the Village of Bellport, the municipality in which both are located.

In 1989, Petitioner filed an application to the Zoning Board of Appeals seeking additional variances to expand its commercial use. At the public hearing held by the Zoning Board of Appeals on Petitioner's application, Respondent and other residents spoke in opposition to Petitioner's application. The Zoning Board of Appeals rejected in part Petitioner's application. (A5-7).

In 1990, Petitioner commenced a libel and slander action against Respondent seeking eight million dollars in damages, based solely on her comments made at the Zoning Board of Appeals hearing. (A9, 29).

The only allegations of slander set forth in Petitioner's complaint (part or original record below) are based on the following statements Respondent made to the Zoning Board of Appeals:

> FIFTH: What I am against is anyone that uses a false concern for the handicapped as a cynical means of justifying illegal activity.
>
> * * *
>
> SIXTH: In the later years, 70's and early 80's, Petitioner had the area roped off during

the theater season, and did not use the side yards for parking . . .

* * *

SEVENTH: Petitioner is serious about handicapped parking? This is something that I mentioned earlier, And (sic) the answer is a very clear no. There are several reasons that I believe that the designation of this areas as so-called, quote, "handicapped parking", is a cynical manipulation by Petitioner in an attempt to legalize its long term illegal conduct.

* * *

EIGHTH: . . . no effort is made to enforce handicapped only parking.

* * *

NINTH: Now, the next point is the area is completely unsuitable for handicapped parking. . . . There are no ramps or walkways leading to the theater entrance.

* * *

TENTH: Petitioner's so-called concern for the handicapped has not extended to even the most basic accessibility improvements. Not only has the Petitioner located this so-called handicapped parking areas in an unsuitable and even dangerous place, but their so-called

concern has not translated any other basic modifications, such as accessible rest rooms, reserved seating for persons who use wheelchairs, appropriate ramps, drinking fountains or telephones.

In conclusion, Petitioner has a long history of broken promises dating back many years. It has continued to violate the law, maintain the illegal storage, parking, noise and illegal year-round activity, despite years of warnings. In fact, the only reasons Petitioner even went to the trouble of making this application was that it was threatened with a refusal to allow it to open for the season. I believe that 39 years is more than enough opportunity for Petitioner to clean up its act. Petitioner continues to show its contempt for village officials by maintaining the illegal activity even while it makes this application.

ELEVENTH: Everybody keeps referring to storage of trucks. I want to point out we are not talking about storage of empty trucks, we are talking using of trucks, storing them there and using them to store materials and scenery. I am mindful of the fact that what happened to Grucci's, that when the trucks used at that plant didn't have proper safety and building and fire alarms and whatever else is necessary went up in an explosion, these trucks were also used for storage illegally, so even separate and a part from storing of these vehicles they have no legal right to use trucks to store anything.

The sole allegation in Petitioner's complaint of the essential element of publication necessary to establish libel was that the oral statements quoted above "were published in an official transcript [of the public hearing] available to the public and members of the community." (part of the original record below). The transcript was prepared by a stenographer hired by Petitioner. (A7, 9).

REASONS FOR DENYING THE WRIT

I.

THIS IS A SLAPP SUIT.

In its unanimous decision affirming the trial court's dismissal of Petitioner's complaint, the Appellate Division noted that this a SLAPP suit — Strategic Lawsuit Against Public Participation. (A25). The court in *Gordon v. Marrone,* 590 N.Y.S. 2d 649 at 656 (Sup. Ct. Westchester County, 1992) described SLAPP suits and their effects:

> **SLAPP suits function by forcing the target into the judicial arena where the SLAPP filer foists upon the target the expenses of a defense. The longer the litigation can be stretched out, the more litigation that can be churned, the greater the expense that is inflicted and the closer the SLAPP filer moves to success. The purpose of such gamesmanship ranges from simple retribution for past activism to discouraging future activism. Needless to say, an ultimate disposition in favor of the target often amounts merely to a pyrrhic victory. Those who lack the financial**

> **resources and emotional stamina to play out the "game" face the difficult choice of defaulting despite meritorious defenses or being brought to their knees to settle. The ripple effect of such suits in our society is enormous. Persons who have been outspoken on issues of public importance targeted in such suits or who have witnessed such suit will often choose in the future to stay silent. Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined.** (Emphasis supplied)

There is no federal jurisdiction for this frivolous appeal. Petitioner merely alleges that its First and Fourteenth Amendment rights have been violated, but provides absolutely no legal authority to establish that its free speech rights have been violated and that this Court has jurisdiction. It is just a continuation of Petitioner's SLAPP suit where the merits or victory of the litigant is not the main purpose. The longer this litigation is "stretched out, the more litigation that can be churned, the greater the expense that is inflicted and the closer the SLAPP filer moves to success." *Gordon v. Marrone, supra.*

The Petitioner commenced this action in 1990, before New York State passed Civil Rights Law, Sections 70-a & 76-a. These statutes give some protection to the targets, like Respondent, of these types of lawsuits. (A25). But, because the SLAPP suit legislation did not become effective until January 1, 1993, after the instant action was commenced, it gives Respondent no protection. (A25). New York State's SLAPP suit legislation was passed "to protect a citizen who is subjected to a SLAPP (Strategic Lawsuits Against Public Participation)" suit arising

out of his or her exercising his or her right of public petition and/or participation. The legislative findings and purpose, as stated in the law, are:

> The legislature further finds that the threat of personal damages and litigation costs can be and has been used as a means of harassing, intimidating or punishing individuals, unincorporated associations, not-for-profit corporations and others who have involved themselves in public affairs . . .

(A25).

In Suffolk County, New York, where this action originated, the bringing of SLAPP suits by businesses and developers became so offensive that as early as 1985, the Suffolk County Legislature adopted a local law authorizing the formation of a "Citizen's Legal Defense Fund", Resolution 1156-1985 (S18-19). This local law sets forth its "Legislative Intent":

> . . . that certain builders, landowners and developers appearing before municipal boards, agencies, commissions and authorities who or which *have applied for . . . entitlement for use or permission to act from a municipality . . . or board have recently resorted to the use of lawsuits to intimidate, harass, disrupt or silence civic associations . . . citizens and individuals from asserting personal viewpoints in connection with such matters.*

(Emphasis supplied)

This local law also sets up a mechanism for individuals suddenly faced with the crushing burden of defending the

exercise of their free speech rights by allowing civic associations and individuals who are sued for speaking out at public meetings to obtain funding for their defense. However, the mechanism established by the law has never received any funding from the county.

Unfortunately, neither the state court decisions nor the state and county legislation have made an impact on Petitioner, who has not stopped pursuing this harassing meritless litigation up through and including this Court.

II.

FIRST AND FOURTEENTH AMENDMENT RIGHTS BELONG TO RESPONDENT, NOT PETITIONER.

Petitioner claims in its petition that its First Amendment right of free speech has been violated by the New York courts conferring absolute privilege on relevant statements made at quasi-judicial proceedings without providing any legal authority for its position. (Petitioner's Brief, pp. 10-16). Yet, "[S]hort of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined" than the intimidation by a SLAPP suit against a person who is speaking and exercising his/her right of petition and participation. This First Amendment right is not intended for the benefit of the person or entity spoken about. *Gordon v. Marrone, supra.*

The Appellate Division in this case wrote that the application of absolute privilege to Zoning Board of Appeals hearings advances an important public policy:

> *. . . by affording an absolute privilege to material and pertinent statements made by the*

> *participants in proceedings before a Zoning Board of Appeals proceeding, we are also advancing the important public policy of encouraging the active participation* of the citizenry in issues affecting the welfare of the community. (Emphasis Supplied)

(A24-25).

Petitioner's argument that the New York courts acted in violation of its First and Fourteenth Amendments' right of free speech is in direct conflict with the rationale of the granting of absolute privilege, which is the *expansion* of free speech:

> The interest of society requires that whenever [persons] seek the aid of courts of justice, either to assert or to defend rights of person, property, [or] liberty, speech and writing therein must be untrammeled and free. *The good of all must prevail over the incidental harm to the individual.* So the law offers a shield to the one who in legal proceedings publishes a libel, not because it wishes to encourage libel, but because *if [persons] were afraid to set forth their rights in legal proceedings for fear of liability to libel suits, greater harm would result, in the suppression of the truth. The law gives to all who take part in judicial proceedings, judge, attorney, counsel, printer, witness, litigant, a right to speak and to write,* subject only to one limitation, that what is said or written bears upon the subject of litigation. [Citations Omitted]

(Emphasis Supplied) (A10-11).

Almost every case that discusses absolute privilege sets forth this same rationale.

Petitioner now argues that it was "denied equal protection of a first amendment right as a result of their [New York courts] application [of absolute privilege] to a Zoning Board of Appeals for a variance from municipal zoning regulations." (Petitioner's Brief, p. 13). Petitioner believes "that protecting the public's right to free speech is a compelling state interest." But Petitioner says that "so, too, is the right of citizens", like Petitioner, as an applicant to a Municipal Board, "to freely participate in the public process without the fear of being harassed, intimidated or punished with costly and baseless litigation by those who seek to silence them." (Petitioner's Brief, p. 14). However, it was Petitioner who commenced and continued this action through every single court it could petition.

Respondent did not seek to silence Petitioner; she merely sought to present her views on Petitioner's application for a zoning variance. She did so by exercising her right of free speech, by addressing the appropriate board at a public hearing convened to consider Petitioner's application and at which public participation was requested.

It is Petitioner's free speech rights that are protected by the First and Fourteenth Amendments. A corporation has no constitutional right, as argued by Petitioner, to prevent or punish those who make relevant statements about it to a Zoning Board of Appeals at a public hearing on the corporation's application for a zoning variance. (Petitioner's Brief, p. 16). Nor does Petitioner provide one citation that supports its position. It just espouses rhetoric and tortured reasoning — characteristic of frivolous and harassing SLAPP suits.

Petitioner has everything in reverse. Petitioner is asking this

Court to look at the right to the constitutional protection from the point of view of the person about whom or the entity concerning which the comments are made and not from the point of view of the speaker, who is exercising his/her right of free speech, which is what the First and Fourteenth Amendments are protecting. In addition, Petitioner is seeking a decision from this Court that would *restrict* a person's free speech rights by denying the right of the state court to confer absolute privilege on a person who makes relevant statements at a quasi-judicial hearing.

Petitioner was not a speaker; the utterances and, therefore, the First Amendment rights belongs to Petitioner.

III.

PETITIONER'S ARGUMENT THAT THE STATE COURTS SHOULD HAVE APPLIED A QUALIFIED, NOT AN ABSOLUTE, PRIVILEGE TO STATEMENTS MADE AT A VILLAGE ZONING BOARD HEARING IS NOT A FEDERAL ISSUE.

In Point III of its brief, Petitioner states that if the New York courts granted a qualified privilege and not an absolute privilege to Respondent's statements, then it would not have "deprived Petitioner of its right not to be defamed." (Petitioner's Brief, pp. 18-21).

This is not a federal question. Nor does Petitioner cite any authority to support its position that this is a federal question. This is strictly a state issue, because the states are the final arbiters of their own laws. *Herb v. Pitcarin*, 324 U.S. 117, 89 L. Ed. 789, 65 S. Ct. 459 (1945); *Wolf v. Weinstein*, 372 U.S. 633, 10 L. Ed. 2d 33, 83 S. Ct. 969 (1963); *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir., 1987), *cert. denied*, 489 U.S. 1065, 103 L. Ed. 2d 809, 109 S. Ct. 1338 (1989).

In addition, the states have a right to impose immunity defenses. *Martinez v. California*, 444 U.S. 277, 62 L. Ed. 2d 481, 100 S. Ct. 553 (1980). The states have broad powers to control tort liability as long as they are not arbitrary. In *Ferri v. Ackerman*, 444 U.S. 193, 62 L. Ed. 2d 355, 100 S. Ct. 402 (1979), the Supreme Court stated that where state law creates a cause of action, it is free to define immunity defenses unless they are in conflict with the Federal Constitution. *See also, Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974).

Most of Petitioner's brief consists of its argument that the New York courts should have applied a qualified privilege and not an absolute privilege to Respondent's statements. Its position is summed up by the following:

> . . . it was not "necessary" for New York to grant an absolute privilege to statements made by a voluntary participant in a Zoning Board of Appeals hearing because a qualified privilege would have accomplished the purpose for which the absolute privilege was intended — to protect speakers from fear of speaking their minds and also encouraging the citizenry to participate in matters of public interest — while at the same time not discriminating against an applicant. Thus, New York's action was not "necessary" to further a "compelling" state interest.

(Appellant's Brief, pp. 34-35).

Petitioner agrees with the principle of absolute privilege, but claims that it should not apply it to a quasi-judicial proceeding. Even the cases of other states cited by Petitioner also apply absolute privilege when the statement is made in a quasi-judicial proceeding. (Appellant's Brief, pp. 25 & 30).

Each of the fifty states has complex immunity rules. *See* Friesen, *State Constitutional Law*, Section 8.01. States do vary on the standards they use to determine which proceedings are quasi-judicial and how each applies their standard.

Petitioner incorrectly states that the "New York courts have not articulated a necessary reason" for the application of absolute privilege to zoning boards of appeals. (Petitioner's Brief, p. 19). New York courts have established a stringent standard to determine whether a proceeding is a quasi-judicial one and when to apply absolute privilege. In 17 pages of its decision, the Appellate Division discusses the cases that applied this standard to zoning board of appeals hearings in New York State and notes the long history and the important public purpose of applying absolute privilege to comments made in quasi-judicial hearings. (A9-26).

The application of absolute privilege to protect free speech is over 100 years old. Since the "mid-19th century", the New York courts have applied absolute privilege to communications made in the course of a judicial proceeding so that it could not form the basis of a defamation action. *Park Knoll Associates v. Schmidt*, 89 A.D. 2d 164, 454 N.Y.S. 2d 901 (2nd Dept. 1982), *rev'd*, 59 N.Y. 2d 205, 464 N.Y.S. 2d 424, 451 N.E. 2d 182, *on remand*, 99 A.D. 2d 772, 472 N.Y.S. 2d 19.

The rationale for this immunity is that:

> The interest of society requires that whenever men seek the aid of courts of justice, either to assert or to defend rights of person, property (or) liberty, speech or writing therein must be untrammeled and free. The good of all must prevail over the incidental harm to the individual. So the law

> offers a shield to the one who in legal proceedings publishes a libel, not because it wishes to encourage libel, but because *if men were afraid to set forth their rights in legal proceedings for fear of liability to libel suits, greater harm would result, in the suppression of the truth.* The law gives to all who take part in judicial proceedings, judge, attorney, counsel, printer, witness, litigant, a right to speak and to write, subject only to one limitation, that what is said or written bears upon the subject of litigation.

Seelman, *The Law of Libel and Slander in New York*, (rev. ed.), p. 223, quoted in *Park Knoll Associates v. Schmidt, supra,* 454 N.Y.S. 2d at 905. (Emphasis supplied.)

Because it was determined that the rationale for absolute privilege exists with equal force for quasi-judicial proceedings, *Moundroukas v. Foley,* 90 A.D. 2d 784, 472 N.Y.S. 2d 32 (2nd Dept. 1984), New York courts have consistently recognized that absolute privilege attaches equally to communications made in administrative proceedings which in substance exhibit quasi-judicial attributes. *Park Knoll Associates v. Schmidt, supra,* 454 N.Y.S. 2d at 905; *Studley v. LeFrak,* 50 A.D. 2d 162, 376 N.Y.S. 2d 200, 204, (2nd Dept. 1975), *aff'd insofar as appealed from*, 41 N.Y. 2d 881, 393 N.Y.S. 2d 980, 362 N.E. 2d 611.

The evolution of the application of absolute privilege to quasi-judicial proceedings in New York *started about 40 years ago. Park Knoll Associates v. Schmidt,* 454 N.Y.S. 2d 901, 89 A.D. 2d 164, *rev'd*, 464 N.Y.S. 424, 59 N.Y. 2d 205, 451 N.E. 2d 182, *on remand*, 472 N.Y.S. 2d 19, 99 A.D. 2d 772.

In *Moundroukas v. Foley, supra,* the Appellate Division

described the public policy rationale for applying absolute immunity to municipal zoning board of appeals:

> . . . public policy consideration behind the absolute privilege, which is to *encourage the free expression* of true information relevant to the public interest, applies to the zoning board hearing where determinations as to land usage is made on the basis of public health, safety and welfare. (Emphasis Supplied).

To the same effect is *Jensen v. Zoning Board,* 130 A.D. 2d 549, 515 N.Y.S. 2d 283 (2nd Dept. 1987), *app. denied,* 70 N.Y. 2d 611, 523 N.Y.S. 2d 495, 518 N.E. 2d 6; *Toker v. Pollak,* 44 N.Y. 2d 211, 222, 405 N.Y.S. 2d 1, 376 N.E. 2d 163 (1978); *Kitchner v. State of New York,* 82 Misc. 2d 858, 371 N.Y.S. 2d 91 (1975); *see also,* Village Law, Section 7-710; Carmody-Wait on New York Practice Vol. 22, pp. 130-131; Anderson, *Zoning*, Section 25.25, pocketpart p. 76.

The law on absolute privilege and the rationale for applying it to quasi-judicial proceedings has been clearly established for years by a long line of cases in New York and other states. It is supported by the compelling public interest that persons should be able to "speak freely . . . insulated from harassment and fear of financial hazard." *Park Knoll Associates v. Schmidt, supra,* 424 N.Y.S. 2d at 426.

As in most SLAPP suits, if there was an ultimate disposition in favor of Petitioner, it would amount "merely to a pyrrhic victory". *Gordon v. Marrone, supra.* Even if Petitioner was correct and Respondent's statements were only entitled to a qualified privilege, Petitioner's action would fail anyway for several reasons.

With a qualified privilege, speech is protected if it was not spoken maliciously. Under New York law, as an adjoining landowner directly impacted by Petitioner's application for use variances permitting it to expand its commercial use, it could never be disproved that at least one of Respondent's motivating factors for speaking out was to protect her property from what Respondent perceived to be potential detrimental effects of the proposed variances. Since Petitioner could never prove that maliciousness was the *sole* motivating factor, her statements were also protected under the theory of qualified privilege. (A31-32). *See, e.g., SRW Associates v. Bellport Beach Property Owners,* 129 A.D. 2d 328, 517 N.Y.S. 2d 741 (2nd Dept. 1987), which held that statements by property owners opposing a cluster zoning application was not malicious, because "at least part of the defendants' motivation was to protect their neighborhood from what they perceived to be potential detrimental effects of the plaintiff's proposed development. As such, maliciousness was not the sole motivating factor. . . ."

Therefore, by applying a qualified privilege instead of an absolute privilege, Petitioner's sole benefit is that the litigation would have been extended and have been more expensive and time consuming to Respondent with discovery and a trial on the issue of maliciousness, but it would not have led to victory for Petitioner.

One only has to look at the statements Petitioner alleges is defamatory (pages 3-7 herein), to see, putting aside such defenses including truth and opinion, that if Petitioner was ultimately successful, the amount of damages would be minuscule at best.

Why then would Petitioner spend thousands of dollars in bringing a meritless action then continue it through to the last possible court? The answer lies in the root of SLAPP suits.

First, the litigation harassed and financially injured Respondent for having the temerity to oppose Petitioner in the past as well as at the Zoning Board of Appeals hearing. For the five years this action has been in existence, this eight-million dollar action has affected Respondent's credit rating. In addition, Respondent has been subjected to public embarrassment and injury from the publicity sought and obtained by Petitioner about this lawsuit, including allegations and inferences that Respondent opposes handicapped parking [a position discredited by the Appellate Division (A7)], yet clearly implied even in Petitioner's petition to this Court [which incidentally sets forth "facts" which are not in the trial court's record. (Petitioner's Brief, pp. 6)].

> . . . [r]umors are effective even if they are later disproved and retracted; *the damage is done by their mere existence, because most people assume "where there's smoke, there's fire".*

You Just Don't Understand, by Dr. Deborah Tannen (1990), page 106. (Emphasis supplied.)

Thus, litigation and its continuance is Petitioner's retribution against Respondent.

Second, this lawsuit had the added benefit to Petitioner of intimidating others from exercising their rights to speak out against Petitioner's business and any of Petitioner's future application to municipal boards. (Since this action was commenced, Petitioner has made other applications to the Village of Bellport; one is presently pending.)

This Court need only imagine the impact on Respondent's neighbors, the ones who spoke out as well as the ones who did

not, against Petitioner's application at the Zoning Board of Appeals, who may want to speak out on Petitioner's future applications, when they learned of this eight-million dollar lawsuit and that it has continued through for five years, three state courts and then to the United States Supreme Court. Who would dare oppose Petitioner again? Persons who have witnessed SLAPP suits "will often choose in the future to stay silent". *Gordon v. Marrowe, supra.* The cost, the emotional toll and the time spent to defend is enormous.

Third, Petitioner also received the economic benefit of the free publicity its business received in the press from the continuation of this litigation. It also gets to write off its litigation costs as a business expense. It has so far been a "no lose" situation for Petitioner, especially since sanctions, though well deserved, have yet to be imposed.

While Petitioner's issue has no federal precedential value, granting damages for this frivolous petition, pursuant to the Court's Rule 42.2, is an important precedent to establish, that will discourage similar frivolous retaliatory petitions, which represent nothing more than continuations of SLAPP suits.

CONCLUSION

The writ of certiorari should be denied and, pursuant to Rule 42.2 of this Court, damages should be imposed.

Respectfully submitted,

GLORIA M. ROSENBLUM
Respondent, Pro Se
192 West Main Street
East Islip, New York 11730
(516) 581-2900